Supreme Court, U.S.
FILED

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No.

IN THE

# SUPREME COURT OF THE UNITED STATES

FRANK SKLAR,

*Petitioner,*

*v.*

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION,
BUREAU OF DRIVER LICENSING,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA

## PETITION FOR A WRIT OF CERTIORARI

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43pp

## QUESTION PRESENTED FOR REVIEW

1. Whether Commonwealth of Pennsylvania's irrebutable presumption that an individual, who fails to meet the visual acuity standards without corrective lenses, is incompetent to drive is a violation of the individual's constitutional right to procedural due process, when the trial court found, as a matter of fact, that the individual was competent to drive?

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Petitioner, Frank Sklar, respectfully petitions this Court to issue a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania in favor of the Respondent, Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing.

## OPINIONS BELOW

The Supreme Court of Pennsylvania denied the Petitioner's Petition For Allowance of Appeal in an unpublished Order on January 5, 2000. Petitioner timely filed an Application For Reconsideration with the Supreme Court of Pennsylvania, which was denied by an unpublished Order entered on March 28, 2000.

The unpublished Opinion and Order of the Commonwealth Court of Pennsylvania, reversing the decision of the Court of Common Pleas of Allegheny County, as well as the Opinion and Order of the Court of Common Pleas of Allegheny County, Pennsylvania are included in the appendix to this petition.

## STATEMENT OF JURISDICTION

The Supreme Court of Pennsylvania entered judgment on January 5, 2000. Petitioner Sklar timely filed an Application For Reconsideration, which was denied by Order dated March 28, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257.

## CONSTITUTIONAL PROVISION INVOLVED

This petition involves the Due Process Clause of Section 1 of Amendment XIV to the Constitution of the United States, which provides, in the pertinent part, that

no state shall, deprive any person of life, liberty or property without due process of law . . . ."

## STATEMENT OF THE CASE

On December 16, 1993, the Commonwealth of Pennsylvania's Department of Transportation (hereinafter referred to as "Departm nt") recalled the operating privileges of Petitioner Frank Sklar. At the time of the recall, Mr. Sklar had not accumulated a traffic ticket for at least twenty years, nor had he been involved in a driving accident. The Department, however, based its recall upon the standards set forth in 67 Pa. Code §83.3(c), which imposes a mandatory recall upon the operating privileges of any person with a corrected visual acuity of less than 20/70.[1] According to the Department, Mr. Sklar's failure to meet the codified medical standards rendered him, per se, incapable of safely operating a motor vehicle. Since a horseback riding incident in 1951, Mr. Sklar has suffered from retinal scars and has not met the visual acuity standards.

Mr. Sklar timely appealed the revocation of his driver's license to the Court of Common Pleas of Allegheny County, Pennsylvania. At the *de novo* hearing, Mr. Sklar presented the deposition testimony of three medical witnesses, Paul B. Freeman, O.D., Chris Cakanac, M.D., and Robert B. Nolan, M.D. In his deposition, Dr. Nolan testified that Mr. Sklar's visual impairment did not interfere with his ability to safely operate a motor vehicle. Drs. Nolan and Cakanac testified that Mr. Sklar passed the field of vision standards set forth at 67 Pa. Code

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[1] The full text of 67 Pa. Code §83.1 through §83.4 is attached hereto as Appendix D, pp. 28a.

§83.3(d) through the use of conventional lenses. The Department presented no evidence to rebut this testimony.

The three medical witnesses presented by Mr. Sklar further testified that with the use of bioptic (or telescopic) lenses, Mr. Sklar would meet the visual acuity standards of 67 Pa. Code §83.3(c). The doctors further agreed that Mr. Sklar could safely operate a motor vehicle while using these lenses. As the doctors noted, the Department regulations provided satisfactory guidelines, but individual evaluations were usually necessary to accurately determine an individual's safe driving abilities. The Department presented no evidence to rebut this testimony.

Mr. Sklar also presented the testimony of Joseph Kilchenstein, a former Pennsylvania State Police Driver's Examiner and professional driving instructor. Mr. Kilchenstein testified that he conducted both day and night evaluations of Mr. Sklar's driving competence. Kilchenstein conducted this examination with Mr. Sklar's use of conventional corrective lenses only and without the use of bioptic lenses. According to Kilchenstein, Mr. Sklar, using conventional lenses, was a safe and competent driver. The Department presented no evidence to rebut this testimony.

On December 20, 1996, the Trial Court found in favor of Mr. Sklar and sustained his statutory appeal of the revocation of his operating privileges. The Trial Court filed an Opinion in support of this Order on November 4, 1998. [App. C, pp. 11a]. Thereafter, the Department filed an appeal to the Commonwealth Court.

After the submission of Briefs and oral argument, the Commonwealth Court filed an unpublished Opinion

reversing the Order of the Court of Common Pleas. *Sklar v. Department of Transportation*, No. 225 C.D. 1997 (Pa.Cmwlth, filed August 4, 1999). [App. B, pp. 3a]. Although the Commonwealth Court recognized the uncontradicted evidence of Mr. Sklar's witnesses, it nonetheless held that the regulatory mandates of 67 Pa. Code §83.3(c) required revocation of Mr. Sklar's operating privileges despite his competence to drive. Contrary to the Pennsylvania Supreme Court's pronouncement that a comparable regulation violated procedural due process,[2] the Commonwealth Court again created an irrebuttable presumption of incompetence to drive based upon the failure to meet the visual acuity requirements set forth at 67 Pa. C.S.A. §83.3(c).

Mr. Sklar timely filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania, which the Court denied, entering judgment on January 5, 2000. Petitioner Sklar timely filed an Application For Reconsideration, which the Pennsylvania Supreme Court denied by Order dated March 28, 2000.

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[2] *Department of Transportation v. Clayton*, 546 Pa. 342, 684 A.2d 1060 (1996). In *Clayton*, the Supreme Court of Pennsylvania held that a regulation which creates an impermissible irrebuttable presumption of incompetence to drive violates the constitutional guarantee of procedural due process. The *Clayton* Court specifically addressed the Department regulation found at 67 Pa. Code §83.4 (Epilepsy). Section 83.4 required the recall of a person's operating privilege for a period of one year following a single epileptic seizure. According to the *Clayton* Court, Section 83.4 cannot be construed to create an impermissible irrebuttable presumption that a person who experienced one seizure is incompetent to drive for a period of at least one year following the seizure. *Id.*, 684 A.2d at 1062.

## REASONS FOR GRANTING THE WRIT

The suspension of issued licenses involves state action which adjudicates important interests of licensees. *Bell v. Burson,* 402 U.S. 535, 539, 91 S.Ct. 1586, 1589, 29 L.Ed.2d 90 (1971). Licenses are not to be taken away without the procedural due process required by the Fourteenth Amendment. *Bell,* 402 U.S. at 539. (Citations Omitted). The hearing required by the Due Process Clause must be meaningful. *Id.*, 402 U.S. at 541.

The hearing procedure affirmed by the Pennsylvania Supreme Court does not satisfy the minimum requirements of procedural due process. The Department presented, as its entire case, the initial report of the Petitioner's treating physician which claimed that the Petitioner could not meets its visual acuity standards without corrective lenses. In rebuttal, the Petitioner presented the testimony of three (3) medical witnesses. Each of these witnesses testified that Mr. Sklar could meet the visual acuity standards as promulgated by the Department with the use of corrective lenses. Additionally, Mr. Sklar presented the testimony of a former driving instructor who testified that the Petitioner was competent to drive. The Trial Court reviewed this evidence, determined that the Petitioner had met its burden, and sustained the Petitioner's appeal. [Trial Court Opinion, App. C, pp. 12a.]

In reversing the Trial Court, the Pennsylvania Commonwealth Court held that the Department's, ". . . visual standards were promulgated under an express grant of legislative power with the force and effect of a statute and that an operator who failed to meet the standards is not competent to drive." [App. B, pp. 7a]. Thus, the Pennsylvania Courts adopted an irrebutable presumption that any individual who fails to meet the

visual standards, without corrective lenses, is *per se* incompetent to drive. By adopting this standard, Pennsylvania has deprived the Petitioner, and others similarly situated, of the right to a meaningful hearing on the merits of the Department's adjudication of the individual's driving rights. This irrebutable presumption deprives the Petitioner of his Constitutional right to procedural due process as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

## CONCLUSION

The Pennsylvania Supreme Court, by affirming the decision of the Pennsylvania Commonwealth Court, has set a dangerous precedent by allowing the Department of Transportation to unilaterally remove an individual's driving rights without affording the individual with a meaningful procedure to attack said removal. This procedure violates the United States Constitution and runs afoul of the Opinions of this Court. Mr. Sklar should be given the opportunity to prove his competence.

WHEREFORE, Petitioner, Frank Sklar, respectfully requests that his Petition For Writ of Certiorari to the Pennsylvania Supreme Court to correct its erroneous ruling.

Respectfully submitted,

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## APPENDIX A

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 598 W.D. Allocatur Docket 1999

FRANK SKLAR,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION,
BUREAU OF DRIVER LICENSING,

Respondent

Petition for Allowance of Appeal
from the Commonwealth Court

### ORDER

*PER CURIAM:*

AND NOW, this 28th day of March, 2000, the Petition for Reconsideration is hereby DENIED.

A True Copy Shelley A. Carrara
As of: March 28, 2000
Attest: /s/Shelley A. Carrara
Deputy Prothonotary
Supreme Court of Pennsylvania

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 598 W.D. Allocatur Docket 1999

FRANK SKLAR,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION,
BUREAU OF DRIVER LICENSING,

Respondent

Petition for Allowance of Appeal
from the Commonwealth Court

ORDER

*PER CURIAM:*

AND NOW, this 5th day of January, 2000, the Petition for Allowance of Appeals is hereby DENIED.

A True Copy Shelley A. Carrara
As of: January 5, 2000
Attest: /s/ Shelley A. Carrara
Deputy Prothonotary
Supreme Court of Pennsylvania

## APPENDIX B

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

NO. 225 C.D. 1997

FRANK SKLAR

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION,
BUREAU OF DRIVER LICENSING,

Appellant

ARGUED: JUNE 17, 1999

BEFORE: HONORABLE BERNARD L. McGINLEY,
Judge
HONORABLE JAMES R. KELLEY, Judge
HONORABLE SAMUEL L. RODGERS,
Senior Judge

*OPINION NOT REPORTED*

FILED: August 4, 1999

MEMORANDUM OPINION
BY JUDGE McGINLEY

The Department of Transportation, Bureau of Driver Licensing (Bureau) appeals from an order of the Court of Common Pleas of Allegheny County (trial court) which

sustained the statutory appeal of Frank Sklar (Sklar) after the Bureau recalled his operating privileges because of a medical condition.

On October 3, 1993, Miguel J. Quintero, M.D. (Dr. Quintero), an opthamologist, submitted a medical report to the Bureau and indicated that Sklar suffered from "vision deficiency that affected the patient's [Sklar] ability, from a medical standpoint, to safely operate a motor vehicle." Initial Reporting Form, September 3, 1993; Reproduced Record (R.R.) at 156a. The Bureau notified Sklar to return his driver's license, "until satisfactory evidence is presented as to proof of competency as authorized by Section 1519c of the Vehicle Code." Bureau Letter to Sklar, December 16, 1993; R.R. at 157a-158a. Sklar appealed to the common pleas court.

The Bureau presented two reports from Dr. Quintero and rested. Sklar presented the deposition testimony of three medical specialists and testimony from a former State Police driver's examiner. Each witness testified that Sklar was a safe and competent driver using corrective lenses.[1] The trial court adopted Sklar's brief *in toto* and sustained the appeal.

The issues for our review are whether there was substantial evidence to support the trial court's determination that Sklar met the visual requirements to restore his operating privileges and whether the prohibition of the use of telescopic lens is discriminatory under Federal law.[2]

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[1] The record indicates that Sklar had no violations or accidents in 25 years and that his condition existed since 1951.

[2] Our scope of review when the trial court takes *de novo* evidence is whether constitutional rights were violated or whether the court manifestly abused its discretion or committed an error of law. *McLaughlin v. Centre County Housing Authority*, 616 A.2d 1073, 1074 n.3 (Pa. Cmwlth. 1992).

The Bureau recalled Sklar's operating privileges on the basis of Section 1519(c) of the Vehicle Code, 75 Pa.C.S. §1519(c), which provides for mandatory recall of a driver's license when a medical report is received by the Bureau that indicates an operator cannot meet visual acuity and/or field of vision requirements. Section 83.3 of the Pennsylvania Code provides:

> (c) *Visual Acuity of less than 20/70.*
> A person with visual acuity of less than 20/70 combined vision with best correction is not authorized to drive.
>
> (d) *Vision Requirements.*
> A person shall have a combined field of vision of at least 150 [degrees] in the horizontal meridian, excepting normal blind spots. . . .
>
> (f) *Telescopic Lenses.*
> Correction through the use of telescopic lenses [a telescopic low vision device] is not acceptable for purposes of meeting acuity requirements.

67 Pa. Code §83.3.

Dr. Quintero reported that Sklar's vision is not correctable to 20/70 and that his visual acuity for the right eye was 8/200, left eye was 20/400, for both eyes 20/400, corrected to 20/200 with a field of vision of 140 degrees, and that telescopic lenses were "only of limited help". Dr. Quintero Report, October 3, 1993; R.R. at 156a.

Sklar presented the testimony of Paul B. Freeman, O.D. (Dr. Freeman), a board-certified optometrist who specializes in low vision. Dr. Freeman opined that Sklar has a visual acuity of 20/400 in the right eye and 20/200 in the left eye corrected with lens to a combined central visual acuity of 20/200, and that his combined field of vision was 140 degrees in the horizontal meridian. Deposition of Paul B. Freeman, O.D., March 31, 1995 (Dr.

Freeman Deposition) at 8, 19, 24; R.R. at 14a, 25a, 30a. Dr. Freeman stated that the use of a telescopic lens[3] would correct Sklar's vision to 20/40 with no effect on his peripheral vision. Dr. Freeman Deposition at 26-27, 36; R.R. at 32a-33a, 41a.

Sklar next presented the testimony of Chris Cakanac, M.D. (Dr. Cakanac), an optimetrist who specializes in low vision and who was referred by Dr. Quintero. Dr. Cakanac opined that Sklar meets the Bureau's field of vision requirements and that unconventional lenses would correct his visual acuity to better than 20/70. Deposition of Chris Cakanac, M.D., July 5, 1995 (Dr. Cakanac Deposition) at 9-10; R.R. at 56a-57a. Dr. Cakanac opined that the Bureau's regulations bear no relationship to an individual's driving ability. Dr. Cakanac Deposition at 14; R.R. at 61a.

Sklar also presented the testimony of Robert B. Noland, M.D. (Dr. Noland), a board-certified ophthalmologist who treated Sklar since 1981. Dr. Noland testified that Sklar's visual acuity with a bioptic lens is better than 20/70 and that his field of vision exceeds 140 degrees. Deposition of Robert B. Noland, October 21, 1996 (Dr. Noland Deposition) at 7-8; R.R. at 87a-88a. Dr. Noland opined that the use of a special bioptic lens would improve Sklar's vision to 20/60 with no effect on his ability to operate a vehicle and no decrease in his field of vision. Dr. Noland Deposition at 10, 13; R.R. at 90a, 93a. Dr. Noland staated that the Bureau's visual require-

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[3]The telescopc lens provides a magnified central field of between eight and twenty degrees. A bioptic lens consists of a miniature telescope mounted upon conventional corrective lenses. Images within this field of vision appear larger and are therefore easier to resolve. *See Sharon v. Larson*, 650 F. Supp. 1396 (E.D. Pa. 1986).

ments are arbitrary without conducting an actual driving test. Dr. Noland Deposition at 18-20; R.R. at 98a-101a.

Joseph Kilchenstein (Kilchenstein), a former Pennsylvania State Police driver's examiner who operates his own driving school, testified that he personally road-tested Sklar on two occasions, in heavy city traffic and at night, that Sklar was wearing conventional lenses and that he is a safe driver. Notes of Testimony, November 14, 1996 (N.T.) at 26; R.R. at 137a.

The Bureau must establish by a preponderance of the evidence that the licensee was incompetent to drive as of the date of the examination. *Klotz v. Department of Transportation, Bureau of Driver Licensing,* 465 A.2d 113 (Pa. Cmwlth. 1983). The Bureau satisfied its burden[4] and contends that the regulations set forth in the Pennsylvania Code are not merely advisory but set forth the minimum visual standards for operators as promulgated under the express grant of legislative power. *See Dare v. Department of Transportation, Bureau of Driver Licensing,* 682 A.2d 413 (Pa. Cmwlth. 1996).

In *Dare,* James P. Dare (Dare) contended that the field of vision requirement found at 67 Pa. Code §83.3 was not a *per se* competency standard, but rather set forth factors to be considered by the court. This Court determined that the visual standards of the regulations were promulgated under an express grant of legislative power with the force and effect of a statute and that an operator who failed to meet the standards is not competent to drive. *Id.* at 414, 415. Because the Bureau established

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[4]We note that medical reports are admitted without corroboration and do not constitute hearsay. *Ploof v. Department of Transportation, Bureau of Driver Licensing,* 590 A.2d 1318 (Pa. Cmwlth. 1993).

that Sklar was incompetent to drive in accordance with the regulations, and Sklar failed to present evidence that he met the Bureau's visual standards, we conclude that the trial court erred in sustaining Sklar's appeal.

Next, the Bureau contends that the trial court erred in determining that the prohibition of the use of telescopic lenses discriminates against Sklar in violation of Federal law. We agree. Sklar has not established the requisite elements to establish unlawful discrimination. A person is considered disabled if he has: a) a physical or mental impairment that substantially limits one or more of the major life activities, b) a record of such impairment, or c) being regarded as having such an impairment. *McDonald v. Commonwealth of Pennsylvania*, 62 F.3d 92 (3rd Cir. 1995). Major life activities are defined as, "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 45 C.F.R. §84.3(j)(2)(ii) (1993). *See Strathie v. Department of Transportation*, 716 F.2d 227 (3rd Cir. 1983). Recently, our United States Supreme Court held that the determination of whether an individual is disabled should be made with reference to measures, including corrective lenses, that mitigate the individual's impairment, and that impairment does not substantially limit a major life activity if it is corrected. *Sutton v. United Air Lines, Inc.*, 1999 U.S. Lexis 4371 (filed, June 22, 1999). Sklar did not testify and presented no evidence to identify any 'major life activity' that his vision substantially limits.

Accordingly, we reverse.

/s/ B.J. McGinley
BERNARD L. McGINLEY, Judge

Judge Kelley dissents.
Senior Judge Rodgers concurs in the result only.

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 225 C.D. 1997

FRANK SKLAR

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION,
BUREAU OF DRIVER LICENSING,

Appellant

ORDER

AND NOW, this 4th day of August, 1999, the order of the Court of Common Pleas of Allegheny County at the above captioned-matter is reversed.

/s/ McGinley, J.
BERNARD L. McGINLEY, Judge

CERTIFIED FROM THE RECORD
AND ORDER EXIT
AUG 4 1999
/s/[Illegible]
Deputy Prothonotary - Chief Clerk

## APPENDIX C

[Filed Nov 4 1998]

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA
SUMMARY APPEALS BRANCH

4220 SA 1993

COMMONWEALTH OF PENNSYLVANIA,

Plaintiff,

VS

FRANK SKLAR,

Defendant.

### OPINION

O'Malley, J.

Copies mailed to:
Andrew Rapach, Esq.
Samuel P. Kamin, Esq.

By notice dated December 16, 1993, the Commonwealth of Pennsylvania Department of Transportation recalled the motor vehicle operator's privileges of Defendant, Frank Sklar, pending the presentation of satisfactory evidence as to proof of competency to operate a vehicle. Specifically, the Department was in receipt of medical

records regarding Defendant's visual acuity which were interpreted by the Department as rendering Defendant incapable of safely operating a motor vehicle.

On appeal from that order to this court we heard testimony and admitted into evidence voluminous expert medical testimony from various depositions.

At the close of the hearing, we ordered the filing of trial briefs to aid our disposition. Following our review of the material submitted to us pursuant to this, we agreed with Defendant's statement of the case, his interpretations of the controlling law and his conclusions. We adopt his brief in its entirely as the basis for our decision of December 20, 1996, and direct the appellate court's attention to it.

/s/ OMalley, J.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

Civil Division
No. S.A. 4200 of 1993

COMMONWEALTH OF PENNSYLVANIA,

Plaintiff,

vs.

FRANK SKLAR,

Defendant.

DEFENDANT'S TRIAL BRIEF

Filed on behalf of Defendant, FRANK SKLAR

Counsel of Record for this Party:
SAMUEL P. KAMIN, ESQUIRE
PA ID #00707

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PA Firm #497

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Pittsburgh, PA 15219
(412) 281-1119

TRIAL BRIEF

Defendant, FRANK SKLAR, by and through his Attorney, SAMUEL P. KAMIN, ESQUIRE and the law firm of GOLDBERG & KAMIN, files this Trial Brief as follows:

## BACKGROUND

On or about December 16, 1993, the Pennsylvania Department of Transportation, Bureau of Licensing (the "Department") recalled Defendant Frank Sklar's driving privileges. Mr. Sklar's driving privileges were recalled pending a determination of his proof of competency pursuant to 75 Pa.C.S.A. §1519(c). His driving privileges had been recalled because medical records had been submitted by Dr. Quintero to the Department, alleging a medical condition which would render Mr. Sklar incapable of safely operating a motor vehicle. This medical condition of multiple retinal scars in both eyes, was caused by a horseback riding accident in 1951.

## ARGUMENT

### I.

### THE DEPARTMENT HAS FAILED TO ESTABLISH THAT MR. SKLAR IS INCOMPETENT TO DRIVE.

A rebuttable presumption of incompetency to drive is created under 75 Pa.C.S.A. §1519(c). The statute provides as follows:

> The department shall recall the operating privilege of any person *whose incompetency has been established* under the provisions of this chapter. The recall shall be for an indefinite period until satisfactory evidence is presented to the department in accordance with regulations to establish that such person is competent to drive a motor vehicle. . . (Emphasis added).

The Commonwealth Court stated in *Ploof v. Commonwealth of Pennsylvania,* 130 Pa. Commw. Ct. 235, 590

A.2d 1318 (1991), that "in order to sustain a suspension under this provision, the department must show by a preponderance of the evidence that the appellate was incompetent to drive, as of the date of recall". The regulations set forth in 67 Pa. Code §83.3 are only guidelines for the Department to use for establishing competency. These guidelines give the Department a starting point for determining, by a drivers examination, those persons who are able to drive.

In the instant matter, the Department revoked Mr. Sklar's license without meeting this burden. It sent Mr. Sklar a letter informing him that his driving privileges had been suspended to to a medical report sent by Dr. Quintero. This report constituted hearsay because Mr. Sklar had no opportunity to cross examine Dr. Quintero under oath in order to determine the basis of this decision. The Department did not request that Mr. Sklar undergo another eye examination or take a driver's test before revoking his license. It clearly failed to demonstrate that Mr. Sklar was incompetent to drive.

Furthermore, Mr. Sklar has rebutted this presumption. He has offered the testimony of Joe Kilchenstein, a former Pennsylvania State Police Driver License Examiner. Mr. Kilchenstein has a background of teaching persons with disabilities how to drive and conducting driving examinations. Mr. Kilchenstein conducted both day and nightttime driving examinations on Mr. Sklar without bioptic lenses, in order to determine whether he was a safe and competent driver. He concluded Mr. Sklar was a safe driver that posed no threat to himself or others. He found that Mr. Sklar was aware of his disability and took this into consideration while he drove. Moreover, Mr. Kilchenstein testified that the examination he gave accurately represented normal driving experiences

that Mr. Sklar would encounter. Therefore, based on his examination, he found Mr. Sklar to be a competent driver.

In addition, three different doctors examined Mr. Sklar and concluded that with the use of bioptic lenses, he would be competent to drive and clearly meet the combined vision requirements guidelines of 20/100 as set forth in 67 Pa. Code §83.3(c) and a horizontal field of vision of at least 140 degrees. In addition, they found that his vision has not changed within the last 20 years. Dr. Freeman stated that by using bioptic or telescopic lenses Mr. Sklar's visual performance would improve (PF, 8). Moreover, Dr. Cakanac found that after a brief trial period, he would be able to drive using bioptic lenses. (CC, 13). Finally, Dr. Noland concluded that Mr. Sklar's visual acuity was 20/60 plus with bioptic lenses with a full field of vision. (RN, 7).

Each doctor testified that the guidelines set forth in 67 Pa. Code §83.3 are only starting points for assessing vision requirements for driving. Dr. Cakanac specifically stated that "the standards that are set in terms of the visual acuity are tests of fine detailed discrimination and do not necessarily represent what you would be encountered with in driving." (CC, 14). Furthermore, he stated that "It does not necessarily indicate driving ability." (CC, 14). In addition, Dr. Freeman testified that the guidelines "would suggest that if someone doesn't meet the criteria, they probably ought to get an individualized evaluation to determine the relationship between eyesight and various other modalities that are required for driving." (PF, 12-13 . Dr. Noland agreed that the regulations are a guideline at which point a patient should be individually evaluated to determine how well they function. (RN, 9).

Even though Mr. Sklar does not meet these guidelines, he has been thoroughly evaluated by three different doctors who have found him competent to drive. Furthermore, he has passed an individual driver's test administered by a professional driver's examiner. Clearly, Mr. Sklar has demonstrated his competency to drive.

## II.

## BY REVOKING MR. SKLAR'S LICENSE PRIVILEGES BASED UPON 67 PA. CODE §83.3, THE DEPARTMENT HAS VIOLATED THE AMERICANS WITH DISABILITIES ACT OF 1990.

The Americans With Disabilities Act (ADA") was established to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities". 42 U.S.C.A. §12101-(b)(1). The United States Congress enacted the ADA to eliminate discrimination against handicapped individuals by extending the nondiscrimination principles required at institutions receiving federal funds by the Rehabilitation Act, 29 U.S.C.A. §791, et seq. (Supp. 1994), to a much wider array of institutions and businesses, including services provided by states and municipalities. 42 U.S.C.A. §12101, et seq.

Joe Kilchenstein testified to his knowledge the Commonwealth receives Federal Financial Assistance for its various programs. The Commonwealth Court also found "Likewise, there is no dispute that DOT receives Federal Financial Assistance, thereby subjecting the Pennsylvania School Bus Licensing Progra to the requirements of Section 504. In re *Stober,* 524 A.2D 535 at 537.

Title II, §12132 of the ADA provides as follows:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall by reason of such disability be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Clearly, to establish a violation of Title II of the ADA an individual must demonstrate that: (1) he is a qualified individual with a disability; (2) a public entity discriminated against him on the basis of that disability; and (3) he has been excluded from participation in or been denied the benefits of the services, programs or activities of a public entity.

In order to determine if the first requirement is met, one must determine what is a disability. A disability is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such impairment; or being regarded as having such impairment". 28 C.F.R. §35.-104. In the case at hand, Mr. Sklar has suffered from mucular degeneration of his central vision. This physical impairment substantially limits his vision, a major life activity. His doctors have testified as to his visual impairment. Therefore, he clearly has a disability as defined in 28 C.F.R. §35.104.

Moreover, a person is considered qualified under the ADA as an individual with a disability if that individual "meets the eligibility requirements", with or without reasonable modifications, for receiving a license. 28 C.F.R. §35.104. Mr. Sklar challenges the Department's assumption that individuals with a visual acuity such as his cannot meet the physical standards required for obtaining a driver's license. In addition, Mr. Sklar con-

tends that when a court determines who is a qualified individual, this determination must include an analysis of whether reasonable modifications to the licensing provisions would allow a disabled individual to meet the essential eligibility requirements.

Dr. Freeman testified that 67 Pa. Code §83.3 was discriminatory because the ADA and Section 504 of the Rehabilitation Act require that the regulations be individualized, but §83.3 are general guidelines. He found §83.3 to be "global and not very specific to an individual", (PF, 16), and therefore a violation of the ADA.

Second, the Department, a public entity, has discriminated against Mr. Sklar by not giving him any individualized considerations. It has failed to take into consideration that he has been driving for over fifty years, and has not had any accidents or citations in the past fifteen years. Dr. Freeman, Mr. Sklar's optometrist, testified in his deposition that there is no causative relationship between one's central visual acuities and the competency of a licensed driver (PF, 12). Furthermore, he noted that Mr. Sklar's use of telescopic lenses would improve his visual performance (PF, 8). Clearly, by using telescopic lenses, he would qualify under the Department's driving standards.

Moreover, Dr. Cakanac, who conducted various tests on Mr. Sklar, stated that by using bioptic lenses, his corrected vision would meet the Department's standards (CC, 10). In addition, Dr. Cakanac opined that after a brief period of trial with bioptic lenses, he would be able to drive without any problems (CC, 13). Dr. Cakanac did not find any other impairments with Mr. Sklar (CC, 12). Therefore, he found Mr. Sklar "to be able to function quite well" (CC, 12).

In addition, Mr. Sklar was evaluated by Dr. Robert Noland, who stated that with glasses, the acuity in his right eye was 20/400 and his acuity in his left eye was 20/300 (RN, 7). Moreover, by using bioptic lenses he achieved a visual acuity of 20/60 plus (RN, 7). Therefore, with bioptic lenses, Mr. Sklar's visual acuity was better than the Department's standards of 20/70 (RN, 7).

Finally, Joe Kilchenstein, a former Pennsylvania State Police Driver License Examiner, tested Mr. Sklar's driving ability both in the daytime and nighttime, and with and without the use of bioptic lenses. Mr. Sklar passed both a day and nighttime examination and was found to be a safe and competent driver. Mr. Kilchenstein found him to pose no threat to himself or others. Clearly, Mr. Sklar, with or without using bioptic lenses, can drive safely and competently and should be allowed to retain his license.

Third, Mr. Sklar has been excluded by the Department from the ability to drive. The Department revoked his license without determining whether he is capable of driving. It has failed to administer a driver's examination to test his driving qualifications. However, he has demonstrated that bioptic lenses aid his driving. He has offered the testimony of Mr. Kilchenstein who found him to be a safe and competent driver without the use of bioptic lenses. Moreover, his doctors have testified as to the safety of the lenses and the ability of Mr. Sklar to be a competent driver.

## III.

## THE COMMONWEALTH'S PROHIBITION AGAINST THE USE OF TELESCOPIC LENSES DISCRIMINATES AGAINST THE HANDICAPPED, AND THEREFORE VIOLATES SECTION 504 OF THE FEDERAL REHABILITATION ACT OF 1973 AND SECTION 5 OF THE PENNSYLVANIA HUMAN RELATIONS ACT, 43 P.S. §955

The Rehabilitation Act of 1971, 29 U.S.C. §794, provides as follows:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or any activity receiving federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

In *Southeastern Community College v. Davis,* 442 U.S. 397, 406, 99 S.Ct. 2361, 2367, 60 L.Ed.2d 980 (1979), the United States Supreme Court held that a "person challenging so-called handicapped discrimination under the Rehabilitation act of 1983, 29 USC §§701-797, must show that he or she is 'otherwise qualified' for the position or program in question." An 'otherwise qualified' person is a person who, despite of his handicap, is able to meet all of the program's requirements. *Id.* In *Hatch v. Secretary of State of Maine,* 879 F. Supp. 147 (1995), the United States District Court stated that this "law is substantively the same under the Americans with Disabilities Act." Mr. Sklar has clearly established that he is an 'otherwise qualified individual'.

He has demonstrated that by using bioptic lenses he is a safe and competent driver. It should be noted that other states including California, New York, West Virginia, Ohio, and New Jersey, allow a person to use telescopic lenses while driving. (PF, 15)

The seminal Supreme Court case of *School Board of Nassau County v. Arline*, 480 U.S. 273, 107 S.Ct. 7123 (1987), is controlling. The Supreme Court, construing the Rehabilitation Act, determined that the interests of individuals with disabilities must be balanced against legitimate concerns for public safety. However, the Court warned that "the determination that a person posed a direct threat to the health or safety of others may not be based on generalization of stereotypes about the effects of a particular disability; it must be based on an *individual* assessment that conforms to the requirements of 28 C.F.R. §36.208(c)", *Arline*, 480 U.S. at 287, 107 S.Ct. at 1131. Therefore, *Arline* establishes the minimum requirements that an individualized assessment should be performed to determine the safety risks posed by disabled individuals.

*Commonwealth Department of Transportation v. Liberatti*, 80 Pa. Commw. Ct. 519, 472 A.2d 741 (1984) concerned a woman who received her driver's license in 1965. However, six years later, she developed a medical condition which diminished her central visual acuity, therefore she stopped driving. She subsequently became aware of bioptic telescopic lenses, and after being fitted for them, began driving again. The Department, after being advised of her medical condition, recalled her license. She appealed.

The trial court found that Mrs. Liberatti was an 'otherwise qualified individual' because, despite her visual impairment, by using telescopic lenses she was able to

meet all the driving requirements set forth by the Commonwealth. The trial court sustained her appeal holding that the regulatory prohibition against the use of telescopic lenses violated §504 of the Federal Rehabilitation Act. In reversing the trial court's decision, the Commonwealth Court relied on the District Court's decision in *Strathie v. Department of Transportation*, 547 F. Supp. 1367 (ED Pa 1982), and found that Mr. Liberatti's claim failed under the Rehabilitation Act.

However, the Commonwealth Court in its decision of *In re Strober*, Pa. Commw. Ct. ____ , 524 A.2d 535 (1987), held:

> We recognize that our decision to remand is inconsistent with our analysis in *Commonwealth Department of Transportation v. Liberatti*, 80 Pa. Commw. Ct. 519, 473 A.2d 741 (1984). However, concurrent with the filing of *Liberatti*, the court of appeals reversed the district court's *Strathie* decision, on which our *Liberatti* opinion had been based.

Furthermore, the court stated that "once an individual established a prima facie case under the Rehabilitative Act, the recipient of federal funds has the burden of proving that the individual is not 'otherwise qualified'." *Puskin v. Regents of the University of Colorado*, 658 F.2d 1372, 1387 (10th Cir. 1981). The Department has clearly failed to demonstrate that Mr. Sklar is not "otherwise qualified."

It should be noted that Mr. Sklar is not asking the Court to lower the Department's safety standards. Rather, he simply requests the opportunity to demonstrate that, despite his disability, he is capable of meeting those standards, or can do so with a reasonable accommodation such as telescopic lenses. This opportunity is

guaranteed to him through the ADA, and upon meeting these standards his license should be reinstated.

III.

67 PA CODE §83.5 IS UNCONSTITUTIONAL AS APPLIED TO THE PRESENT CASE BECAUSE THE TWO-PART TEST WHICH MUST BE MET BY THE PENNSYLVANIA DEPARTMENT OF TRANSPORTATION DOES NOT BEAR A RATIONAL RELATIONSHIP TO A LEGITIMATE STATE OBJECTIVE.

In a letter dated December 16, 1993, the Department stated that medical records were submitted which indicated that Mr. Sklar had "a medical condition which is not compatible with the safe operation of a motor vehicle". Therefore, the Department is required to address this case pursuant to the standards set forth in 67 Pa. Code §83.5. The second part of the test is to demonstrate that the physical or mental impairment, "in the opinion of the examining licensed physician, could interfere with the ability to control and safely operate a motor vehicle" 67 Pa. Code §83.5(a)(9). *Klotz v. Commonwealth of Pennsylvania,* 77 Pa. Commw. Ct. 134, 465 A.2d 113 (1983).

The Department must prove by a preponderance of the evidence that Mr. Sklar has a physical or mental impediment *and* that such impediment renders him incompetent to drive. Pursuant to 67 Pa. Code §83.5(b), "a person afflicted by any of the conditions enumerated in subsection (a)(1), (5) or (9) *may* be required to undergo a special driving examination". Mr. Sklar has undergone a driving test conducted by Mr. Kilchenstein and passed this test. Clearly, his visual acuity does not render him

incompetent to drive. Therefore, his driver's license should not be revoked.

Moreover, the standards set forth in 67 Pa. Code §83.5 are unconstitutional both on their face and as applied. Pennsylvania courts have long held that the Commonwealth may regulate the use of its highways as long as such conditions bear a *rational relationship to a legitimate state objective. Kostyk v. Commonwealth of Pennsylvania, Department of Transportation,* 131 Pa. Commw. Ct. 455, 570 A.2d 644, 647 (1990), citing *Sheakley v. Department of Transportation,* 99 Pa. Commw. Ct. 328, 513 A.2d 551, 553 (1986). To do otherwise would violate Mr. Sklar's State and Federal Constitutional rights under the due process and equal protection clauses.

67 Pa. Code §83.5 was promulgated based on a concern for safe driving. This is obviously a legitimate state objective. However, the two-part test set forth in this section bears no rational relationship to this legitimate state objective.

The two-part test provides that the department can revoke an individual's driver's license upon proving that: (1) the person suffers from any physical or mental impairment, and (2) in the opinion of a physician such impairment could interfere with one's ability to safely control a motor vehicle. The purpose of the section is to insure that the person is a "safe driver, regardless of impairments". 67 Pa. Code §83.5. The only rational method of attaining this goal is to provide any person whose driving ability is in question with the opportunity to take a driving examination under the supervision of a professional licensed examiner. A driving examination would be "rationally related" to the legitimate state objective of promoting safe driving. Under the terms of

the state, the Department is not required to conduct a special driving examination, *which is clearly violative of* an individual's constitutional rights. 67 Pa. Code §83.5-(b).

Moreover, Dr. Freeman stated that "there has never been a study that suggests that there's a relationship – a causative relationship or a correlation between central visual acuities and motor vehicle mishaps." (PF, 12). He further opined that there is no relationship between competency and visual acuities. (PF, 12).

Further, a physician is not a party who has the ability to attest to how a driver's physical or mental impairment affects an individual's ability to drive safely. Only a person who has accompanied the individual during an actual driving examination is in the position to assess whether and to what extent a physical or mental impairment affects the driver's ability to operate a motor vehicle safely. Therefore, 67 Pa. Code §83.5 is unconstitutional based upon the "rational relationship" standard articulated in both *Kostyk*, supra, and *Sheakley*, supra.

In addition, Mr. Sklar's doctors opine that visual acuity does not demonstrate whether he is incompetent to drive. Dr. Noland stated that it would be better to place the individual in a "situation in which they are called upon to drive a vehicle and demonstrate whether they have the ability to do that safely or not" (RN, 12). He opined that, "I think that he should be evaluated by perhaps actually riding with him in a car and driving with him and assessing his ability." (RN, 19). In fact, Dr. Cakanac stated that it would be appropriate to give an individual who does not meet the standards of §83.5 an individualized examination to determine whether or not the individual is able to drive (CC, 13).

Clearly, Mr. Sklar has demonstrated that his visual impairment does not affect his ability to drive. His doctors have testified that his vision meets the Department's requirements, if he uses bioptic lenses. In addition, he had taken a driver's examination offered by Mr. Kilchenstein, a former Pennsylvania State Police Driver License Examiner, and passed. Therefore, Mr. Sklar has clearly demonstrated that his visual impairment has no effect on his ability to drive.

## CONCLUSION

For the foregoing reasons, Defendant, Frank Sklar, respectfully requests that his driver's license be reinstated retroactively.

Respectfully submitted,

/s/ Samuel P. Kamin
SAMUEL P. KAMIN
Attorney for Defendant,
FRANK SKLAR

# APPENDIX D

## DEPARTMENTAL REGULATIONS

## CHAPTER 83. PHYSICAL AND MENTAL CRITERIA, INCLUDING VISION STANDARDS RELATING TO THE LICENSING OF DRIVERS

Sec.

83.1. Purpose.
83.2. Definitions.
83.3. Visual standards.
83.4. Epilepsy.
83.5. Other physical and medical standards.

### Authority

The provisions of this Chapter 83 issued under the Vehicle Code, 75 Pa.C.S. §§151517, 1518 and 6103, unless otherwise noted.

### Source

The provisions of this Chapter 83 adopted May 18, 1979, effective May 19, 1979, 9 Pa.B. 1631; readopted April 19, 1991, effective April 12, 1991, 21 Pa.B. 1813, unless otherwise noted.

### Notes of Decisions

A physician does not have a duty to control his patient's driving by reporting a physical condition to the Department of Transportation or to protect third persons from injuries sustained from unforeseeable accidents. *Crosby v. Sultz*, 592 A.2d 1337, 1345 (Pa. Super. 1991).

**Cross References**

This chapter cited in 67 Pa. Code §73.3 (relating to vision examination); and 67 Pa. Code §231.66 (relating to applicability).

**§83.1. Purpose.**

Section 1517(b) of the act (relating to medical advisory board) authorizes the Department to adopt physical and mental criteria, including vision standards, for licensing of drivers under Chapter 15 of the act (relating to licensing of drivers). These physical and mental criteria have been formulated by the Medical Advisory Board under the authority of sections 1517 and 1518 of the act (relating to medical advisory board and reports on mental or physical disabilities or disorders). In addition to their use by the Department in connection with its responsibilities under Chapter 15 of the act, these physical and mental criteria shall be used by physicians in conducting physical examinations of applicants for learner's permits and driver's licenses and by physicians and other persons authorized to diagnose and treat disorders and disabilities covered in this chapter in determining whether a person examined by the provider should be reported to the Department as having a disorder affecting the ability of the person to drive safely.

**Source**

The provisions of this §83.1 adopted May 18, 1979, effective May 19, 1979, 9 Pa.B. 1631; amended April 11, 1986, effective April 12, 1986, 16 Pa.B. 1279; readopted April 19, 1991, effective April 12, 1991, 21 Pa.B. 1813. Immediately preceding text appears at serial page (147543).

**§83.2. Definitions.**

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

*Act*—75 Pa.C.S. §§101—9910 (relating to Vehicle Code).

*Daylight*—Hours between sunrise and sunset.

*Department*—The Department of Transportation of the Commonwealth.

*Licensed optomestrist*—A doctor of optometry licensed by the State Board of Optometrical Examiners.

*Licensed physician*—A doctor of medicine licensed by the State Board of Medicine or a doctor of osteopathy licensed by the State Board of Osteopathic Medical Examiners.

*Provider*—A person authorized to diagnose or treat disorders or disabilities covered in this chapter, including, but not limited to, licensed physicians, podiatrists, psychologists and osteopathic physicians.

*Telescopic lens*—A telescopic low vision device.

**Source**

The provisions of this §83.2 adopted May 18, 1979, effective May 19, 1979, 9 Pa.B. 1631; amended April 11, 1986, effective April 12, 1986, 16 Pa.B. 1279; readopted April 19, 1991, effective April 12, 1991, 21 Pa.B. 1813. Immediately preceding text appears at serial page (147544).

**Cross References**

This section cited in 67 Pa. Code §71.2 (relating to definitions).

**§83.3. Visual standards.**

(a) *Driving without corrective lenses.* A person with visual acuity of 20/40 or better combined vision may drive without corrective lenses, but if that person has less visual acuity than 20/40 in one eye, that eye shall be corrected to its best visual acuity.

(b) *Driving with corrective lenses.* A person with less visual acuity than 20/40 combined vision shall wear lenses correcting his vision to 20/40 or better while driving, except that if correction to 20/40 is not possible, the person may drive in daylight hours only if one of the following are met:

(1) The combined vision has been corrected to 20/60 or better.

(2) Visual acuity is less than 20/60 combined vision but at least 20/70 combined vision with best correction, but only upon recommendation of a licensed optometrist or licensed physician who has equipment to properly evaluate visual acuity.

(c) *Visual acuity of less than 20/70.* A person with visual acuity of less than 20/70 combined vision with best correction is not authorized to drive.

(d) *Vision requirements.* A person shall have a combined field of vision of at least $140^{o}$ in the horizontal meridian, excepting the normal blind spots.

(e) *Sight in one eye.* A person may be adequately sighted in only one eye and still meet the requirements of this section; however, the person's driving privilege will be restricted to vehicles having mirrors so located as to reflect to the person a view of the highway for a distance of at least 200 feet to the rear.

(f) *Telescopic lenses.* Correction through the use of telescopic lenses is not acceptable for purposes of meeting acuity requirements.

**Source**

The provisions of this §83.3 adopted May 18, 1979, effective May 19, 1979, 9 Pa.B. 1631; amended April 11, 1986, effective April 12, 1986, 16 Pa.B. 1279; readopted April 19, 1991, effective April 12, 1991, 21 Pa.B. 1813. Immediately preceding text appears at serial pages (147544) and (107973).

**Notes of Decisions**

The provisions of this section (formerly 67 Pa. Code §157.3), which disallow the use of telescopic lenses to meet visual acuity requirements for driver's licenses, do not violate section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794) or equal protection or due process provisions of the Federal or State constitutions. *Department of Transportation v. Liberati,* 472 A.2d 741 (Pa. Cmwlth. 1984).

§83.4. Epilepsy.

(a) *General.* A person suffering from epilepsy may not drive unless their personal licensed physician reports that the person has been free from seizure for a period of at least 1 year immediately preceding, with or without medication.

(b) *Applicants between the ages of 16 and 18 years.* Applicants between the ages of 16 and 18 years applying for their first license shall have been free from seizure for a period of at least 2 years immediately preceding, without or without medication.

(c) *Waiver.* Waiver of the freedom from seizure requirement may be made upon specific recommendation by a licensed physician who specializes in neurology or neurosurgery if:

(1) A strictly nocturnal pattern of the condition has been established over a period of at least 3 years immediately preceding, without or without medication; or

(2) A specific prolonged aura accompanied by suffucient warning has been established over a period of at least 5 years immediately preceding, with or without medication.

**Source**

The provisions of this §83.4 adopted May 18, 1979, effective May 19, 1979, 9 Pa.B. 1631; readopted April 19, 1991, effective April 12, 1991, 21 Pa.B. 1813. Immediately preceding text appears at serial page (107973).